

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-868

FREDERICK KIMBERK

vs.

DOROTA WYSOCKA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this divorce action that is before us for a third time,¹ the husband argues (1) that the judge erred when he denied the husband's motion for the return of \$131,783 that he paid to the wife pursuant to a postjudgment order that this court later vacated; and (2) that the judge erred in denying the husband's "motion for clarification" which was filed in 2017, nearly four years after the entry of the judgment of divorce and two years after that judgment was affirmed by this court. The motion to clarify is without merit, and was properly denied. As to the \$131,783, we remand for further proceedings as to a portion of that amount -- \$90,000 -- which was comprised of net profits the

¹ The prior appeals consisted of an appeal from a temporary order, pretrial, and an appeal from the judgment of divorce nisi. Kimberk v. Wysocka, 87 Mass. App. Ct. 1118 (2015); Kimberk v. Wysocka, 88 Mass. App. Ct. 1116 (2015) (Kimberk I).

husband received from properties that he had been ordered to transfer to the wife, but had delayed in transferring.

Background.² In 2009 the plaintiff Frederick Kimberk (husband) filed for divorce following a thirteen-year marriage to the defendant Dorota Wysocka (wife). A trial was held in January 2013 to determine, among other things, how the parties' substantial real estate holdings should be divided. On the fifth day of trial the parties reached an agreement and filed a handwritten memorandum of understanding (MOU) with the court, which set out a formula for valuing and distributing the marital estate. The parties intended the MOU to be a preliminary agreement that would be finalized within fourteen days.³ The MOU expressly contemplated, however, that if the parties were unable to reach a final agreement, the preliminary agreement would be binding and would be incorporated into the divorce judgment.

After two weeks the parties could not reach a final agreement, and the wife informed the judge that the husband was not cooperating in finalizing the MOU.⁴ After a hearing, the

² See also Kimberk I for an additional recitation of the facts.

³ Certain terms in the MOU were not final because additional information, such as the mortgage amounts on the properties, needed to be filled in to reach final figures. In Kimberk I we termed this additional information "ministerial."

⁴ At a hearing on the issue, the husband attempted to reject the settlement terms on the grounds that they were unfair and that he was pressured into signing the agreement. He argued that the

judge entered the judgment of divorce nisi (divorce judgment) on December 30, 2013, and incorporated the terms of the MOU. The divorce judgment provided that the husband would transfer two commercial properties in Boston and Cambridge to the wife,⁵ while the husband would retain the remaining commercial properties. The husband was also required to make an equalization payment of \$1,954,475. The husband filed a motion for new trial, which was denied. He then appealed the divorce judgment, and the denial of his motion for new trial. His appeal was docketed in this court on April 24, 2014.

The husband delayed in transferring the Cambridge and Boston properties, which led to further motion practice in the probate court even after the appeal had been docketed. The MOU, as incorporated into the divorce judgment, unfortunately did not set a specific date by which the transfers must occur. Accordingly, as of August of 2014, the wife had filed a motion (1) to have the husband ordered to transfer the properties, and (2) for the payment to her of the net rents for those properties, which the husband was collecting and keeping. On October 16, 2014, the judge ordered the husband to transfer the

agreement "takes . . . the properties that make money and give[s] them to [the wife] and the properties that [he is] left with have negative cash flows." The husband refused to provide required property assessments that were necessary to complete the MOU with current property valuations.

⁵ The wife also received a residential property.

properties, to pay back rents to the wife, and to transfer all tenant security deposits to her (clarification order). The judge determined that the properties should have been transferred no more than thirty days following the divorce judgment, and ordered that net rents received by the husband beyond that date were due to the wife. The husband appealed the clarification order as well, and his appeals were consolidated. The husband eventually paid \$131,783 to the wife pursuant to the clarification order. This amount included \$38,023 in security deposits, \$90,000 as payment for net rental profits received, and \$3,760 in attorney's fees.

On December 8, 2015, this court issued its decision on the husband's consolidated appeals. See Kimberk I. We affirmed the divorce judgment and the adoption of the MOU. We also affirmed the denial of the husband's motion for a new trial. However, we vacated the clarification order because the judge did not have jurisdiction to enter the order; the clarification order had entered in October 2014, after the case had already been docketed in this court. Id.

Following this court's 2015 decision in Kimberk I, both parties returned to the probate court, where they filed several new motions. Each party filed a motion that sought clarification of what should be done about the \$131,783 that the husband had paid to the wife in response to the clarification

order. In June 2016, the wife filed a renewed motion for clarification of the divorce judgment, which asked the judge to confirm that she could retain the monies paid to her. In July 2016, the husband filed a motion to amend the divorce judgment to conform to the decision in Kimberk I (2016 motion to amend), in which he argued that because the clarification order was vacated, any money paid pursuant to that order should be returned. The judge denied both motions without explanation; the husband appealed.

Over one year later, on August 22, 2017, the husband filed yet another "motion to clarify" the judgment (2017 motion to clarify). This motion argued that the equalization payment required by the 2013 divorce judgment must be "clarified," because it had been based on inaccurate property values and mortgage amounts provided by the wife. The motion was filed over three years after the divorce judgment entered, and nearly two years after Kimberk I. The judge denied the 2017 motion to clarify in a written decision. The husband again appealed. The husband's appeals from the denial of his 2016 motion to amend, and his 2017 motion to clarify, have been consolidated here.

Discussion. 1. The husband's 2017 motion to clarify. The husband argues on appeal, as he did in his motion below, that the equalization payment of \$1,954,475, which was contained in the divorce judgment, was improperly calculated. He claims that

the miscalculation occurred due to incorrect assessed values and mortgage amounts supplied by the wife in her proposed judgment. He argues that as a result his equalization payment was incorrectly inflated by approximately \$275,000.

This argument is entirely without merit. The husband could have challenged the wife's figures, or provided figures of his own, before judgment entered. He did not, instead choosing to attempt to avoid the MOU entirely. The husband also might have raised these arguments in a timely rule 60 motion; again, he did not. See Mass. R. Civ. P. 60, 365 Mass. 828 (1974). The husband then appealed the 2013 divorce judgment, which was his opportunity to challenge in this court the equalization payment, and how it was calculated. Indeed, in Kimberk I he did raise issues concerning the calculation of the equalization payment that are very similar to those he raises now.⁶

This court affirmed the divorce judgment in 2015, which included the requirement that the husband pay the equalization amount. There was no mechanism for him to further challenge the divorce judgment in 2017. Finality of judgments is a principle to be respected. See Harker v. Holyoke, 390 Mass. 555, 558-559

⁶ For example, the husband argued that the judgment incorrectly applied the methodology for distributing real estate assets set out in the MOU. His contention was that the court relied on "reported mortgage values" provided by the wife, as opposed to using "current mortgage values," which is the way it is referred to in the MOU.

(1983). A rule 60 motion on the grounds the husband raised in his 2017 motion to clarify would have been untimely. See Mass. R. Civ. P. 60 (b) (motions alleging mistake in the judgment must be brought within one year after judgment entered). See also Kennedy v. Beth Israel Med. Ctr., Inc., 73 Mass. App. Ct 459, 466-467 (2009). No "motion to clarify" is available under the circumstances here, where pursuant to the divorce judgment, the equalization amount was to be paid (and presumably was paid) years ago.

2. The \$131,783 payment. As for the husband's motion for the return of the \$131,783 paid to the wife, we are constrained to remand as to a portion of that amount -- the \$90,000 in net rental profits from the two properties that the husband had been ordered to transfer, but did not. As noted, the October 14, 2014 clarification order was entered when the judge lacked jurisdiction. The question is what to do once the clarification order was vacated by this court. The husband asserts that he is entitled to be returned to where things stood before the order entered. We are only partially persuaded.

The \$38,000 in security deposits on the two properties should have been transferred to the wife pursuant to the divorce judgment. Paragraph four of the "Division of Assets" section of the divorce judgment directed that the security deposits "be accounted for and transferred to [the wife]." No further order

or clarification was required. There is no excuse for the husband's failure to pay these amounts over, and they need not be returned.

As to the \$90,000 in net rental profits, the divorce judgment is unfortunately less clear. The divorce judgment required the husband to transfer the Cambridge and Boston properties, but the judgment expressly contemplated that the transfer would not occur immediately. Where no deadline is stated for the transfer of property, a judge ordinarily will set the time for performance as a "reasonable date," to be determined based upon all of the circumstances, and "without changing the essence of the contract." Duff v. McKay, 89 Mass. App. Ct. 538, 545 (2016). In the now-vacated October 2014 clarification order, the judge concluded that thirty days from the judgment was a reasonable time to effect the transfers, and that rents received by the husband after those thirty days rightfully belonged to the wife. Since the judge was without jurisdiction to so order, we remand this case so that the probate court can again consider who is entitled to the net rents that the husband received on the Cambridge and Boston properties between the December 2013 divorce judgment and the October 2014 clarification order.⁷ Since this requires the judge

⁷ As noted, the divorce judgment contemplated that the transfers might not occur immediately, in that it provided for an interim

to construe the divorce judgment, the question is appropriately left to the probate court in the first instance.⁸ See Warner Ins. Co. v. Commissioner of Ins., 406 Mass. 354, 361 (1990). The monies shall remain with the wife pending the judge's decision on remand.^{9,10}

The order denying the husband's 2017 motion to clarify the judgment is affirmed. The portion of the order denying the husband's 2016 motion to amend the judgment to conform to the ruling of the Appeals Court which relates to the \$90,000 payment to the wife of the net rental profits is vacated, and the matter is remanded for further proceedings consistent with this memorandum and order. On remand, the \$3,760 in attorney's fees paid to the wife should also be revisited. The remainder of

payment by the husband of \$3,500 per month for any period that preceded him making the real estate transfers and the "initial equalization payment." To the extent the judge determines, on remand, that the husband owes net rents to the wife, the husband may be entitled to a credit for any such interim payments made.

⁸ We are aware that the judge who entered the clarification order has since retired.

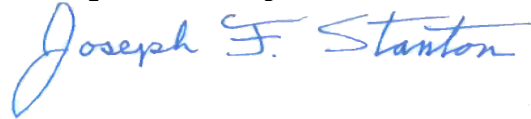
⁹ The husband argues that the "mandate rule" requires that the money he paid be returned to him. Our decision in Kimberk I, however, merely vacated the clarification order; it did not require the return of the monies the husband paid.

¹⁰ As noted, the \$131,783 included \$3,760 in attorney's fees, presumably incurred by the wife in pursuing the 2014 motion to have the security deposits and rents transferred. On remand, the judge should address the propriety of that payment as well. We note that the wife has already been partially successful in pursuing her motion, inasmuch as she received the security deposits.

that order (with regard to the payment to the wife of the
\$38,000 in security deposits) is affirmed.

So ordered.

By the Court (Milkey,
Neyman & Englander, JJ.¹¹),



Clerk

Entered: August 12, 2019.

¹¹ The panelists are listed in order of seniority.